held, on these facts, there was no completed sale of the property, no title passed to the defendant, and he was not liable for the price. Whether he was liable, as bailee, for failure to return according to his contract, was not determined.

The contract, therefore, in *Elphick* v. *Barnes*, being at its inception only a bailment and not a present sale, the question simply is, how far a bailee is excused from his implied or even express obligation to return the property bailed in as good condition, by the death or unavoidable destruction of the property, without his fault.

And if a contract to sell and deliver at a future day is excused, by the death or loss of the property before that day, without the owner's fault, as has been frequently held (see *Dexter* v. *Norton*, 47 N. Y. 62), it would seem very clear that such an excuse would be sufficient to exonerate a mere bailee, custodian, &c., from returning property held under such a contract.

Accordingly it was long since decided that a borrower of a horse was not liable for not returning him, if he died in his possession, without his fault: *Williams* v. *Lloyd*, W. Jon. 179; s. c. *Williams* v. *Hide*, Palm. 548; *Young* v. *Braces*, 5 Litt. 324; *Harris* v. *Nicholas*, 5 Munf. 483.

On the same principle, where a plaintiff in replevin had been ordered to return the animal replevied, and the animal died without his fault, before any suit was commenced on the bond to return it, this was held a good defence: *Carpenter* v. *Stevens*, 12 Wend. 589.

Of course, in such a contract as in *Elphick* v. *Barnes*, if the buyer during the time allowed for a return of the property, so misuses the property as materially to impair its value, that disables him from returning it, and makes the sale absolute and renders him liable for the price, even though he attempted to return it, but without acceptance of the vendor: *Ray* v. *Thompson*, 12 Cush. 281. EDMUND H. BENNETT.

## RECENT AMERICAN DECISIONS.

### *Supreme Court of the United States.*

### THE PENNSYLVANIA COMPANY *v.* JOSEPH E. ROY.

A carrier of passengers, for hire, is bound to observe the utmost caution characteristic of very careful, prudent men.

He is responsible for injuries received by passengers, in the course of their transportation, which might have been avoided or guarded against by the exercise, upon his part, of extraordinary vigilance, aided by the highest skill.

Such caution and diligence extends to all the appliances and means used by the carrier in the transportation of the passenger.

He must provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers; and for the slightest negligence or fault in that regard, from which injury results to the passenger, the carrier is liable in damages.

A passenger purchased from a railroad company a ticket over its line, and at the same time, from the Pullman Palace Car Company, a ticket entitling him to a berth in one of its sleeping-cars, *constituting a part of the train of the railroad company.* In the course of transportation he was injured by the falling of a berth in the

sleeping-car, in which he was at the time riding. *Held*, that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers, was the negligence of the railroad company.

In such cases, the passenger injured being entitled only to compensatory damages, evidence as to his poverty, or as to the number and ages of his children, is irrelevant.

An exception to the admission of irrelevant testimony is cancelled, when the court, before the final submission of the case to the jury, distinctly instructs them to disregard such evidence. The presumption should be, so far as this court is concerned, that the jury based their verdict upon legal evidence only.

IN error to the Circuit Court of the United States for the Northern District of Illinois.

Defendant in error recovered a verdict and judgment for $10,000 for personal injuries received while riding, as a passenger, in a sleeping-car which belonged to the Pullman Palace Car Company, but constituting, at the time the injuries were received, a part of a train of cars managed and controlled by the Pennsylvania Company, as lessee and operator of the Pittsburgh, Fort Wayne and Chicago Railway. The action was commenced in the Supreme Court of Cook county, Illinois, against the Pennsylvania Company, the Pittsburgh, Fort Wayne and Chicago Railroad Company and the Pullman Palace Car Company. It was subsequently dismissed by the plaintiff against all the defendants except the Pennsylvania Company, and then removed for trial into the Circuit Court of the United States for the Northern District of Illinois, where the judgment complained of was rendered.

The facts set forth in the bill of exceptions, so far as material, were these: On the 5th of June 1876 the defendant in error, purchased at the office of the lessee company, in the city of Chicago, a "first-class railroad ticket" from that city to Philadelphia, over the line of that company. At the same time and place, and of the same person, he purchased a sleeping-car ticket, issued by the Pullman Palace Car Company, for the route between the same cities, and for that ticket he paid the additional sum of $5. He took the train the same day, going immediately into the section of the sleeping-car corresponding to his ticket. The next morning at Alliance, Ohio, upon the invitation of a friend, travelling upon the same train, he entered the sleeping-car in which that friend was riding, and there engaged with him in conversation. While so

engaged the upper berth of the section, in which they were sitting, fell. Thereupon the porter of the sleeping-car came at once and put up the berth, saying it would not fall again. Shortly thereafter the berth fell a second time, striking the plaintiff upon the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment.

After the second falling of the berth, the brace or arm supporting it was found to be broken.

The evidence introduced by the plaintiff tended also to show that the Pennsylvania Company provided cars in which passengers, having railroad tickets, could ride without purchasing a sleeping-car ticket; that Roy had much experience in travelling, and would have gone into one of those cars had he not purchased a sleeping-car ticket; that at the time he purchased the sleeping-car ticket he did not know what company ran the sleepers, but upon taking the train he ascertained it was a Pullman car; that the Pullman Palace Car Company was engaged in furnishing cars to be run in the trains of railroad companies; that, besides the general conductor of the train, there was a conductor, in uniform, and a porter, whose duty it was to make up the berths and attend to the wants of passengers occupying the sleeping-car.

Upon the trial the plaintiff introduced a time and distance card of the defendant corporation, issued, published and circulated by that company during the year 1876, prior to the date of his injuries. That card, referring to the "Fort Wayne and Pennsylvania Railroad line," stated that three express trains left Chicago daily, one "*with popular vestibule sleeping-car*," one "with drawing-room and hotel-car," and one "*with drawing-room sleeping-car*" It gave notice that "passage, excursion and sleeping-car tickets" could be purchased at the defendant company's office in Chicago. Referring to the "Fort Wayne and Pennsylvania line," the same card announced that "no road offers equal facilities in the number of through trains, *equipped with Pullman palace sleeping-cars*." It stated, among the advantages of the "Pittsburgh, Fort Wayne and Pennsylvania through line," that the latter was the "only line running three through trains, *with Pullman palace cars*," and "the only line *running sleeping-cars* from Chicago and intermediate stations to Philadelphia without change." The same card gave the rates charged for berths and sections in Pullman sleeping-cars from Chicago to points east of that city.

The defendant, to maintain the issues on its part, offered to prove,

1. That the sleeping-car in which the accident occurred, and all the sleeping-cars then and theretofore on the defendant's line, since the 27th January 1870, were owned by the Pullman Palace Car Company, a corporation of the state of Illinois, and not by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided they also held sleeping-car tickets.

2. That the Pullman Palace Car Company, and it only, issued tickets for sale, entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indicated as places for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon its door that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

3. That the Pullman Palace Car Company employed persons to take charge of its cars, and whilst in use they were in the immediate charge of a conductor and a porter employed by that company; that such conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

To this proof the plaintiff objected, and the objection was sustained, to which ruling the company excepted.

The court thereupon charged the jury, that the proof tended "to show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding." To that charge the company at the time excepted, upon the ground that it was unsupported by the testimony, and because it assumed as a fact that the persons in charge of the sleeping-car were the company's agents or servants.

The court further charged the jury that "the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if this car composed a part of the

train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car, without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To that charge also the defendant excepted.

The opinion of the court was delivered by

HARLAN, J.—We are of opinion that there was no substantial error, either in excluding the evidence offered by the defendant or in the charge to the jury. The court only applied to a new state of facts, principles very generally recognised as fundamental, in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *Philadelphia and Reading Railroad Co.* v. *Derby*, 14 How. 486, it was said, that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence—that the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. This doctrine was expressly affirmed in *Steamboat New World* v. *King*, 16 How. 474. In *Stokes* v. *Saltonstall*, 13 Pet. 191, affirming the decision of Chief Justice TANEY on the circuit, we said, that although the carrier does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to the extent, that he or his agents, where he acts by agents, shall possess competent skill and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in *Railroad Co.* v *Pollard*, 22 Wall. 350, where, speaking by the present chief justice, we said, that we saw no necessity for reconsidering *Stokes* v. *Saltonstall.*

These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution, characteristic of very careful, prudent men. He is responsible for injuries received by passengers, in the course of their transportation, which might have been avoided or guarded against by the

exercise, upon his part, of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must, necessarily, be extended to all the agencies or means employed by the carrier, in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines, to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb nor question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground, that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others.

The undertaking of the railroad company was to carry the defendant in error over its line, in consideration of a certain sum, if he elected to ride in what is known as a first-class passenger car; with the privilege, nevertheless, expressly given in its published notices, of riding in a sleeping-car, *constituting a part of the carrier's train*, for an additional sum paid to the company owning such car.

As between the parties now before us, it is not material that the sleeping-car in question was owned by the Pullman Palace Car Company, or that such company provided, at its own expense, a conductor and porter for such car, to whom was committed the immediate control of its interior arrangements. The duty of the railroad company was to convey the passenger over its line. In performing that duty, it could not, consistently with the law and the obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or cause it to be made, if it elected to reserve or exercise no such control or right of inspection, from time to time, of the sleeping-cars which it used in conveying passengers, as it should exercise over its own cars, it was chargeable with negligence or failure of duty. The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior

arrangements of the sleeping-car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers, while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons, for hire, through any device or arrangement with a sleeping-car company, whose cars are used by, and constitute a part of the train of, the railroad company, to throw off the duty of providing proper means for the safe conveyance of those whom it has agreed to convey: 2 Kent's Com. 600, 12th ed; 2 Parsons on Contr. 218–19, 6th ed.; Story on Bailments, sects. 601, 601a, 602; Cooley on Torts 642; Wharton's Negligence, 2d ed., sect. 627, *et seq.*: Chitty on Carriers, S. P. 256 *et seq.*, and cases cited by the authors.

It is also an immaterial circumstance that Roy, when injured, was not sitting in the particular sleeping-car to which he had been originally assigned. His right, for a time, to occupy a seat in the car in which his friend was riding, was not, and, under the facts disclosed, could not be questioned.

Whether the Pullman Palace Car Company is not, also, and equally, liable to the defendant in error, or whether it may not be liable over to the railroad company for any damages which the latter may be required to pay on account of the injury complained of, are questions which need not be here considered. That corporation was dismissed from the case, and it is not necessary or proper that we should now determine any question between it and others.

2. Upon the trial below the plaintiff was allowed, against the objection of defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited.

This evidence was, obviously, irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence

of injuries received. But the damages were not, in law, dependent, in the slightest degree, upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial, subsequently recognised the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rules by which such loss should be ascertained, the court proceeded: "But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the real question being how much his ability to earn money in the future has been impaired."

Notwithstanding this emphatic direction that the jury should exclude from consideration any evidence in relation to the pecuniary condition of the plaintiff, the contention of the defendant is, that the original error was not thereby cured, and that we should assume that the jury, disregarding the court's peremptory instructions, made the poverty of the plaintiff an element in the assessment of damages. And this, although the record discloses nothing justifying the conclusion that the jury disobeyed the direction of the court. To this position we cannot assent, although we are referred to some adjudged cases which seem to announce the broad proposition that, an error in the admission of evidence cannot afterwards be corrected by instructions to the jury, so as to cancel the exception taken to its admission. But such a rule would be exceedingly inconvenient in practice, and would often seriously obstruct the course of business in the courts. It cannot be sustained upon principle, or by sound reason, and is against the great weight of authority. The charge from the court that the jury should not consider evidence, which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in

their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval.

3. There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children—a son, ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted, that is, beyond what was, under all the circumstances, fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is, that it had some influence upon the verdict.

The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff, but as nothing was said by it concerning the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn and should not be ignored in the assessment of damages.

For this error alone the judgment is reversed, and the cause remanded for a new trial.

The decision of the Supreme Court of the United States in the above case is important, for two reasons, viz.: 1. As showing that while some of the state courts are inclined to relax the obligations of the common carrier of goods and the carrier of passengers, whenever an opportunity presents itself for so

doing, the supreme federal court adheres to the rule which, established on grounds of public policy, it has, on all occasions, maintained. 2. As applying the rules of law to new circumstances. We believe the exact question determined in this case—the liability of a railroad company for an *injury* received in a Pullman car—has not been determined in any previously reported case in an appellate court.

But as we have said, the principles upon which the decision is based are not new, and we, therefore, propose in this note to review the cases, both English and American, in which they are to be found, and to state the rule, which may properly be drawn therefrom. Confining our discussion to the liability of passenger carriers, we shall only incidentally, and that in but one relation, deal with common carriers of goods.

An instructive case on this point is *John* v. *Bacon*, Law Rep., 5 C. P. 437. A carrier by water, for the purpose of embarking his passengers, used a hulk belonging to another person. A passenger, while waiting on the hulk for the boat, fell through a hatchway which had been negligently left open. All the judges of the Court of Common Pleas agreed that the carrier was liable. "I think there was, by the issuing of a ticket," said BOVIL, C. J., "a contract with the plaintiff to carry him safely, * * * and that, therefore, independently of any occupation of the hulk, the defendant was responsible for an injury resulting from want of care." "I also agree," said KEATING, J., "with what my Lord has said, with respect to the defendant's contract to carry the plaintiff. It was clearly during the course of the transit that the accident occurred, through the negligence either of the defendant's servant or those of the owners of the hulk, and under the authority of *Great Western Railroad Co.* v. *Blake*, 7 Hurlst. & N. 987, it does not matter which." MONTAGUE SMITH, J., concurred, and BRETT, J., added: "I do not feel at all satisfied that the control of the defendant over the hulk was such as in itself to render him responsible for the acts of the owners of the hulk or their servants. He had no such control, it seems to me, as would make him liable for their acts, as a master is liable for the negligent acts of his servants. I doubt whether any invitation, which does not amount to a contract or to a false and fraudulent misrepresentation, can be the foundation of a legal liability. If the contract of carriage in this case did not cover the hulk, I should very much doubt whether the defendant was liable. I feel perfectly clear, however, that the contract of the defendant was to carry the plaintiff from the shore at Milford Haven to Liverpool, and that the hulk, therefore, was part of the means of transport, and that it was the improper state of this, the result of negligence, which caused the accident, and if so, I think the defendant was responsible, whether its state was caused by the negligence of his own servants or of other persons. It seems to me that *Great Western Railroad Co.* v. *Blake*, as I gather the reasons of the decision from the judgment of the Lord Chief Justice and my brother BYLES, is an authority for that; and I think it has been authoritatively explained as laying down that principle in *Buxton* v. *North Eastern Railroad Co.*, Law Rep., 3 Q. B. 549, which is also an authority for the decision at which we have arrived in this case." So, a carrier is liable for an injury sustained by a passenger by slipping on ice carelessly left on the depot platform, although the depot is owned or controlled by a third party (*Seymour* v. *Chicago Railroad Co.*, 3 Biss. 43); and the owner of a stage-coach is responsible for the negligence of the proprietors of a ferry over which the stage-coach is obliged to pass: *McLean* v. *Burbank*, 11 Minn. 277.

*Great Western Railroad Co.* v. *Blake*

7 H. & N. 987, referred to above, clearly settled this important principle in England, at least, viz.: that where a railroad company contracts with a passenger to carry him from one place to another, and on the journey, the train has to pass over the road of another company, the company issuing the ticket incurs the same responsibility for an accident arising on that other line as it would on its own; and this although the contracting company had no control over the road in fault and was not responsible, otherwise, for its management. In *Blake's Case*, B. purchased a ticket at the depot of the G. company from P. to M. The line of the G. company extended from P. to G.; from G. to M. the road belonged to the S. company. B. travelled from P. to G. in safety, but between G. and M. was injured by a collision caused by the negligence of the servants of the S. company, but without the fault of the driver of the train or any of the servants of the G. company. A judgment against the G. company was affirmed in the Exchequer Chamber. Subsequently, in the Queen's Bench, it appeared that B. was a passenger by the defendant's railroad, to be carried from S. to T. To reach S. it was necessary to travel over a line belonging to another company; while passing over the latter line, the train on which B. was came into collision with a bullock, which had strayed on to the line from an adjoining field, by breaking through the fence. On the authority of *Blake's Case*, the defendant was held to be the proper party to sue. So where T. bought a ticket of the defendant company to be carried from A. through B. to C., and it appeared that at B. the defendant's line joined the line of another company, over which the defendant had a right by statute to run to C., and between B. and C., T. was injured, no negligence being attributable to the servants of the defendant, it was nevertheless decided that the defendant company was liable: *Thomas* v. *Rhymney Railroad Co.*, Law Rep., 5 Q. B. 226; Law Rep., 6 Q. B. 226.

*Macku* v. *London and Southwestern Railroad Co.*, 2 Ex. 415, arose under the English Carriers' Act, which exempts a carrier from liability as an insurer for silk goods, &c., but provides: that "nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter or other servant in their employ." The plaintiff delivered to the defendant company a bale of silk for carriage. The bale was placed in a van under the charge of one Johnson, a porter in the employ of Chaplin & Home, a firm employed by the defendant to carry goods for them. The silk was stolen by Johnson. On the trial it was contended that Johnson was not a servant of the defendants and in their employ within the meaning of those words in the statute. But the Lord Chief Baron directed a verdict for the plaintiff and his direction was affirmed by the Court of Exchequer. "This statute," said PLATT, B., "when considered with attention, can be very plainly expounded, and ought to be construed with reference to the duty of carriers, according to the custom of the realm. Without this statute a carrier would be liable for the safety of the goods until their arrival at their place of destination. * * * Any person employed by a carrier to perform the contract into which he enters, is a servant in the employ of the carrier within the true meaning of this statute. Any other construction would be the parent of very dangerous consequences. These companies might let out every single part of their carriers' business, which is generally very extensive, to others, who might employ other servants under them. If we were to hold that such servants

are not the servants of the company, a complete immunity would be obtained from the responsibility for every single theft that might be committed from one end of their line to the other, under the pretext that the persons by whom the theft had been committed were not their servants or in their employ. It would be an exceedingly dangerous doctrine to hold, that these persons, who employ all the profits derived from the carriage of the goods, shall by a sub-contract unknown to the other party, get rid of their responsibility."

*Thorpe* v. *New York Central, &c., Railroad Co.*, 13 Hun 70; s. c. 76 N. Y. 402, decided in New York in 1879, though not referred to by Mr. Justice HARLAN, in his opinion in the principal case, will probably remain the leading adjudication on this phase of the law of the drawing-room and sleeping car. The New York Central Railroad Company had a contract with Wagner, by which Wagner agreed to place upon its road certain drawing-room cars of his make and bearing his name. The terms of the contract were such it is presumed as are usual in such cases, in agreements between railroad companies and sleeping or palace car companies. Wagner agreed at his own cost to place upon the defendant's road as many drawing-room cars as should be required for the accommodation of the defendant's traffic, to keep the cars in good repair, to provide conductors and porters, who were to have charge of the distribution of compartments and seats therein without interference from the conductors of the trains. The latter were to be allowed at all times to enter the cars for the purpose of collecting fares of passengers, or for any purpose connected with the management of the train, and the porters and conductors of the drawing-room cars were to assist the conductors of the regular trains, whenever called upon, in maintaining order and discipline on the train. Wagner was to account monthly to the road as to the receipts and earnings, and was to pay the defendant twenty per cent. of the gross earnings, after deducting license fees paid for any patented inventions used in the cars, which payment was in consideration of the service performed by the defendant in hauling the cars, furnishing fuel and lights therefor, and repairing the trucks, brakes and exterior of the cars. The defendant reserved the right to determine the location of the drawing-room cars in its trains. The question in the case was the liability of the defendant for the wrongful ejection of a passenger from the drawing-room car by the porter of that car. In the Supreme Court the answer was in the affirmative. Said BOARDMAN, J.: "If the porter had been defendant's servant, no reasonable doubt could exist as to its liability under the facts proved. It may well be that Wagner is liable; of that we need not now consider. The legislature of this state has given to the defendant certain franchises. It cannot divest itself of its responsibility under the laws for the proper exercise of its duties. The arrangement between the defendant and Wagner was private and personal. When Wagner's car was put into the train, it became a part of defendant's train, was under the control of its conductor, was in his care and custody. The defendant and not Wagner ran the train. In effect Wagner, by his agreement, supplied the defendant with certain cars to be used for the joint interest of Wagner and defendant. The Wagner cars were run for joint account. Why, then, are not Wagner's servants in these drawing-room cars also the servants of the defendant? Why shall not the defendant be held responsible for the wrongful act of Wagner, or his agent, while upon its road and under its control? * * * We are led to the conclusion that the defendant was liable for the acts of the porter of the Wagner car, to the same extent as if he had been hired by, and was in

ine immediate employment of the defendant." One judge dissented. On appeal to the Court of Appeals this ruling was unanimously affirmed. ANDREWS, J., in delivering the opinion of the court, stated the reasons for the rule adopted with admirable clearness: "The business of running drawing-room cars, in connection with ordinary passenger cars, has become one of the common incidents of passenger traffic on the leading railroads of the country. These cars are mingled with the other cars of the company, and are open to all who desire to enter them, and who are willing to pay a sum in addition to the ordinary fare, for the special accommodation afforded by them. They are put on presumably in the interest of the road. They form a part of the train, and the manner of conducting the business is an invitation to the public to use them, upon the condition of paying the extra compensation charged. Passengers cannot know what private or special arrangement, if any, exists between the company and third persons under which this part of the business is conducted, and they have, we think, in taking one of these cars, a right to assume that they are there under a contract with the company, and that the servants in charge of the drawing-room cars are its servants. Otherwise there would be two separate contracts in the case of each passenger in these cars, one with the company and one with Wagner. Such a condition of things would involve a confusion of rights and obligations, and divide a responsibility which ought to be single and definite. *Take the case of a passenger in a drawing-room car, who should be burned by the negligent upsetting or breaking of a lamp by the porter, or the case of a passenger in a sleeping car injured by the porter's negligence.* Is the passenger, in these or other similar cases which may be supposed, to be turned over, for his remedy, against Wagner, on the ground that the servant who caused the injury was his servant and not the defendant's. The public interest and due protection to the rights of passengers require that the railroad company, which is exercising the franchise of operating the road for the carriage of passengers, should be charged with and responsible for the management of the train, and that all persons employed thereon should, as to passengers, be deemed to be the servants of the corporation." The passage italicized in the above extract suggests an injury similar to that received in the principal case. In a very recent Massachusetts case, the plaintiff took passage on the defendant's railroad, and also purchased a ticket entitling him to ride in a sleeping car forming part of the train. While *en route* he left the car at a *depot* to take dinner, leaving his baggage in the car, on the assurance of an employee that it would be safe there. On his return to the car he found that his baggage had been transferred to another sleeping car in the train, and that one article was missing. In an action for the loss the defendant offered to prove that the sleeping car did not belong to it, but to another company which managed and controlled it, and that it was in the care and charge of the employees of the owners, under a contract with the defendant under which the owners were to furnish the sleeping cars and conductors, and servants to take charge of them, and collect the fares for the sleeping accommodations; on these facts the defendant contended that it was not liable. The trial judge thought otherwise and directed judgment for the plaintiff, which ruling was affirmed on appeal. "The plaintiff's contract of transportation," said GRAY, C. J., "was with the defendant alone. The fact that the car was not owned by the defendant, but was used on the road under a contract with other parties, who furnished conductors and servants to take charge of such car, there being no evidence that the plaintiff knew of that contract, or had any

notice that the car was not owned by the defendant, and under its exclusive control, could not affect the measure of the defendant's liability to the plaintiff:" *Kinsley* v. *Lake Shore, &c., Railroad Co.*, 125 Mass. 54.

The rule as to the responsibility of a carrier for the agencies employed by him in the conduct of his business, is applied with great strictness to the case of a common carrier of goods. Of late years there has grown up in the carrying trade an extensive and important auxiliary whose functions now supply a public necessity which the railroad and the steamboat do not attempt, viz: the *personal* delivery of property of small bulk, called express, forwarding or dispatch companies, as the case may be; these important public servants were early held by the court to all the duties and liabilities of the carrier at common law. *Stadhecker* v. *Combs*, 9 Rich. 193; *Buckland* v. *Adams Ex. Co.*, 97 Mass. 124; *Southern Ex. Co.* v. *Newby*, 36 Ga. 635; *Read* v. *Spaulding*, 5 Bosw. 395; *Christenson* v. *American Ex. Co.*, 15 Minn. 270; *Sherman* v. *Wells*, 28 Barb. 403; *Baldwin* v. *American Ex. Co.*, 23 Ill. 197; *Verner* v. *Sweitzer*, 32 Penn. St. 308; *Sweet* v. *Barney*, 23 N. Y. 335. But because in nearly every instance they neither owned nor were intended to own, nor could possibly control the agents which they were obliged to employ, because an expressman did not own the railroads or the steamboat upon which the goods were transported, it was argued with some degree of force that they could not be responsible for the defaults or the negligence of such agents as they could neither direct nor watch nor control. This argument prevailed to some extent in an inferior New York court (*Hersfield* v. *Adams*, 19 Barb. 577), but only to be soon afterwards denied: *Place* v *Union Express Co.*, 2 Hilt. 19; *Read* v *Spaulding*, 5 Bosw. 395; s. c. 30 N. Y. 630; *Russell* v. *Livingston*, 19 Barb. 346 Later, however, it obtained a more important victory in one of the federal Circuit Courts, in the well known case of *Bank of Kentucky* v. *Adams Ex. Co.*, Lawson on Carriers 436. The receipt of an express company for two packages of money released it from liability for any loss or damage occasioned by fire, *i. e.* accidental fire. The money was carried by rail in an iron safe, under the care of a messenger of the express company. While in transit the train was thrown from the track, the express car took fire and the packages were destroyed. On the trial in the United States Circuit Court for the District of Kentucky, BALLARD, J., instructed the jury as follows: "If you believe that the package was destroyed by fire as above indicated without any fault or neglect on behalf of the messenger of the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care or from the negligence of the Louisville and Nashville Railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility is undoubtedly responsible for losses, whether occurring on vehicles controlled by him exclusively or belonging to and controlled by others; because he is an insurer for the safe delivery of the article which he has agreed to carry; but when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others, over which he

has no control, and uses reasonable care, that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from the want of care of his employees. Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it, that is, give no more effect to it than if it had not been adduced." When the case was taken to the Supreme Court of the United States, a contrary doctrine was announced by that distinguished tribunal. "With this ruling (that of the court below)" said Mr. Justice STRONG, "we are unable to concur. The railroad company in transporting the messenger of the defendant and the express matter in his charge was the agent of somebody, either of the express company or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants, a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them nor had they any control over the railroad company or its employees. It is true the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service and that service was directly and immediately for them. Control of the conduct of an agency in not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him and not to one who neither employs it nor pays it, nor has any right to interfere with it. If, then, the Louisville and Nashville Railroad Company was acting for these defendants and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Company* v. *Lockwood*? The foundation of the rule is that it tends to the greater security of consignors who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriers more unreliable. This is equally true whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control.

Theoretically he has; but most frequently when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor, and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be."

Two cases—one in England the other here—attempt to stem this tide of authority, the one hesitatingly, the other sturdily: *Wright* v. *Midland Railroad Co.*, Law Rep., 8 Exch. 137; *Sprague* v. *Smith*, 29 Vt. 421. In the English case, as in *Thomas's Case*, a railroad company, by statutory authority, ran over a portion of the defendant's line. At the point of junction between the two lines, were signals which were in charge of the defendant's servants. The servants of the first company having negligently disobeyed the signals given, one of their trains collided with one of the defendant's trains, and the plaintiff, a passenger in the latter train was injured. No negligence being imputed to the defendant's servants, it was held that the plaintiff could not recover. *Great Western Railroad Co.* v. *Blake* and *Thomas* v. *Rhymney Railroad Co.*, *supra*, were "distinguished" by the court, satisfactorily to it, presumably, if not to others. The act of the negligent company the court argued was not negligence which related to the carrying of the plaintiff; "it was done while he was being carried it is true, but it had nothing to do with his being carried." It was done by the negligent company for their own purposes, in a matter not connected with the carrying of the plaintiff. "It was not a negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but done outside of the carrying, and which caused damage to the plaintiff while he was being carried." This is certainly a fine distinction. It would have been better, and at the same time much easier, had the court squarely denied the rule that the carrier is bound to have its means of transit as safe as the highest vigilance can insure. If a railroad is not bound to keep its track clear, then it is not liable at all for an injury received by a passenger in a collision; if it is not bound to see that a third person, who uses its road with its consent, shall not be the cause of an injury to a passenger, then this decision is correct. But both these propositions are negatived by abundant authority. In *Sprague* v. *Smith*, 29 Vt. 421, the defendants were trustees operating a road upon which the plaintiff was a passenger, having an arrangement with another company to run their cars over their road. The car in which plaintiff was riding while on the track of the other company was carelessly run into by a train of the latter. The Supreme Court of Vermont held that the defendants were not liable. The court, after stating the general rules governing the liabilities of passenger carriers, said: "We do not perceive that this rule of liability could make the carrier of passengers liable for the act of a party over whom he had no control. If the act causing the injury were that of a servant or operative employed upon the train carrying the plaintiff, although such operative were furnished and paid by another company, as the engineer in the present case, the carrier is undoubtedly liable. So, too, if the injury is caused by the misconduct of other servants of the same carrier, who is carrying the plaintiff while operating other trains, the carrier is liable. But he cannot be regarded as liable, we think, for all the acts of all the operatives of the companies over whose roads he carries the plaintiff, unless some connection between the roads of a char

acter similar to that of general partnership or the consolidation of their interests in the carrying business is shown, which was not done in the present case." It may be observed that this ruling has not been cited with approval in any subsequent case. It is, as has been seen, entirely opposed to the authorities cited above, and is likewise at variance with the conclusions in the following cases: *McElroy* v. *Nashua, &c., Railroad Co.*, 4 Cush. 400; *Murch* v. *Concord, &c., Railroad Co.*, 29 N. H. 9; *Peters* v. *Rylands*, 20 Penn. St. 497; *Champion* v. *Bostwick*, 11 Wend. 571; 18 Wend. 175; *Barron* v. *Illinois, &c., Railroad Co.*, 1 Biss. 453; 5 Wall. 90; *Toledo, &c., Railroad Co.* v. *Rumbold*, 40 Ill. 143; *Candee* v. *Pennsylvania Railroad Co.*, 21 Wis. 582; *Hart* v. *Railroad Co.*, 8 N. Y. 37; *Nelson* v. *Railroad Co.*, 26 Vt. 717; *Railroad Co.* v. *Winans*, 17 How. 39; *Schopman* v. *Railroad Co.*, 9 Cush. 25; *Weed* v. *Railroad Co.*, 19 Wend. 534; *Williams* v. *Vanderbilt*, 28 N. Y. 217; *Wyman* v. *Railroad Co.*, 46 Me. 162.

Shortly, the principles to be deducted from the foregoing cases are:

1. A carrier is responsible for injuries received by a passenger in the course of his transportation, which might have been avoided or guarded against by the exercise on his part of extraordinary vigilance, aided by the highest skill.

2. This vigilance and skill is demanded of him as to all the agencies or means employed by him in the transportation of the passenger.

3. If, in order to perform his engagement with the passenger, he is obliged to rely on others, it does not change his liability that he is not able to direct or control them.

4. No contract or agreement between the contracting carrier and another carrier, unknown or unassented to by the passenger, can oblige the latter to resort for his remedy to any other carrier than the one with whom his contract for carriage was made.

JOHN D. LAWSON.

St. Louis.

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## *Court of Chancery of New Jersey.*

### HENRY FLAACKE *v.* MAYOR OF JERSEY CITY ET AL.

A solicitor who is a party to a suit and appears in his own behalf, is entitled to the allowances made by the fee-bill for his services therein, except a retaining fee.

Certain items of costs and their taxation and allowance considered.

MOTION for re-taxation of costs.

*S. B. Ransom*, for the motion.

*S. C. Mount*, contra.

RUNYON, Chancellor.—The complainant objects not only to certain items of the bills of costs as taxed for the defendants Andrew B. Church and S. C. Mount respectively, on the ground that the allowances are greater than the law authorizes, but insists that Mr. Mount, who is a solicitor of this court, and appeared in the cause

in his own person, is not entitled to any costs, because he did not appear by solicitor. The objections cannot be sustained. A solicitor who is a party to a suit and appears in his own person, is entitled to the allowances made by the fee-bill for his services therein, except, of course, for a retaining fee. *Willard* v. *Harbeck*, 3 Denio 260. * * *

[Here the Chancellor reviewed the items objected to, which being merely local are omitted.] The clerk performing the solicitor's work, at his request, charges him for it the fees to which the latter is entitled; and for convenience in keeping accounts between them, places the charge in the clerk's column instead of the solicitor's. The charge of $1.85 is, if the bill in fact contains three folios, correct. The objection to the charge for entering appearance is that fifty-two cents are allowed for it, whereas but twenty cents should have been allowed. Here, again, the clerk has done the solicitor's work and charges him the fees to which the latter is entitled for doing it. The solicitor's fees for drawing the appearance are according to immemorial practice, there being no special provision for this work in the fee-bill, as there is not for his compensation for drawing a bill of costs, twenty cents. The clerk was, as the law stood when the appearance was entered, entitled to twelve cents for filing, and to twenty cents for entering the appearance. There is no error in this item.

These charges by the clerk for solicitor's work at solicitor's rates, have the sanction of very long-continued practice through the administration of various clerks, and the propriety thereof seems not to have been called in question. They are just. If made in the solicitor's column of the bill of costs there would be no ground for challenging them, for the solicitor is entitled to make them. From time immemorial the practice has been, for convenience, to charge them in the clerk's column. It of course makes no difference to the suitor who is required to pay them, whether they are charged in the one or the other. If the clerk does such work for the solicitor at his request, the fee allowed to the latter by the fee-bill would be the reasonable compensation for it.

The construction of the fee-bill which has been followed in the taxation of costs for filing the answer and its accompanying affidavits, &c., has existed for very many years and under different clerks in chancery, and though the attention of the legislature appears to have been drawn to it in the passage of the act of 1879

(Pamph. L. of 1879, p. 103), yet it left the construction undisturbed except in the respects specified, and it so, by implication, recognised it. By that act it is provided that if upon any paper filed there be "endorsed any return, affidavit of service or of non-residence or statements of sheriffs on executions, or masters' fees, or other matter," but one fee for filing such paper with such matter endorsed thereon shall be allowed. It will be seen that the prohibition (for such, in view of the existence of the practice under consideration, it in effect is) is directed merely to certain endorsements, and it does not extend by its terms (nor by implication) to affidavits of verification and schedules attached to a bill or answer. It has reference to returns and matters of a like character, without regard to the mode in which they are made, whether it be by statement or affidavit.

All the charges excepted to are allowable, except the retaining fee in Mr. Mount's bill. It does not appear that he employed counsel, and therefore a retaining fee will not be allowed. As to the alleged excess in the charges and allowances for the number of folios in papers, those errors, if they exist, are of course to be corrected. No costs of this motion will be awarded to either party.

Officers may not detain papers or records until their fees are paid: *Anon.*, Dickinson's Prec. 24; *Taylor* v. *Lewis*, 2 Ves. 111; *Hayne* v. *Watts*, 3 Swanst. 93; *Wait* v. *Schoonmaker*, 15 How. Pr. 460; *Young* v. *Sutton*, 2 V. & B. 365; *Rex* v. *Bury*, Doug. 185, note; see *Owen's Case*, 2 Ves. 25; *Farewell* v. *Coker*, 2 P. Wms. 460; nor the body after a *habeas corpus*: *Hopman* v. *Barber*, 2 Str. 814.

A party not a practising attorney or solicitor cannot be entitled to costs for practising: *French* v. *Morgan*, 1 Hogan 230; *Stewart* v. *New York*, 10 Wend. 597; *People* v. *Steuben*, 12 Id. 200; *Verplanck* v. *Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Gillis* v. *Holly*, 19 Ala. 663. In *Gordon* v. *Scott*, 2 Bank. Reg. 28, a party serving the subpœnas on his own witnesses was held entitled to the costs therefor. See *Anon.*, Hal. Dig. 240, § 8.

Nor one pretending to be an attorney, but who has never been admitted: *Coates* v. *Hawkyard*, 1 Russ. & Myl. 746; *Willett* v. *Lord Clifton*, Glassc. 254; *Humphreys* v. *Harvey*, 1 Bing. N. C. 62; *Jones* v. *Hayman*, Barn. 46; *Ames* v. *Gilman*, 10 Metc. 239; *Perkins* v. *McDuffee*, 63 Me. 181; *Tedrick* v. *Miner*, 61 Ill. 189; *Robb* v. *Smith*, 3 Scam. 46. See *Stevens* v. *Fuller*, 55 N. H. 443.

A solicitor being temporarily uncertificated will not estop him: *Jones's Case*, Law Rep., 9 Eq. 63; *Prior* v. *Moore*, 2 M. & S. 605. See, however, *Sparling* v. *Brereton*, Law Rep., 2 Eq. 64; *Angell's Case*, 6 D. & L. 144; *Fullalove* v. *Parker*, 8 Jur. (N. S.) 1078; *Young* v. *Dowlman*, 3 You. & Jer. 24; nor affect the rights or liabilities of the parties to the suit, who are not attorneys: *Reader* v. *Bloom*, 10 Moore 261; 3 Bing. 9; *Hope's Case*, Law. Rep., 7 Ch. 766.

An admission in another court has

sometimes been deemed sufficient: *Wilkinson* v. *Diggell*, 1 B. & C. 158; *Hulls* v. *Lea*, 10 Q. B. 940. See *Evans* v. *Duncombe*, 1 Cr. & Jr. 372; *Hill* v. *Sydney*, 7 Ad. & E. 956.

Attorneys who are partners should all be admitted in the courts in which they practise: *Willett* v. *Clifton*, Glassc. 254; *Hittson* v. *Brown*, 3 Col. 304. Yet it seems sufficient to recover, that one of them has been admitted in the court where the services were rendered: *Arden* v. *Tucker*, 4 B. & Ad. 815; *Harland* v. *Lilienthal*, 53 N. Y. 438; *Turner* v. *Reynell*, 14 C. B. (N. S.) 328; *Meddlowcroft* v. *Holbrooke*, 1 W. Bl. 50. See *McGill* v. *McGill*, 2 Met. (Ky.) 258; *Klingensmith* v. *Kepler*, 41 Ind. 341; *Jones* v. *Page*, 44 Ala. 657.

The omission to obtain a license from the United States does not disqualify an attorney as to costs: *Harrington* v. *Edwards*, 17 Wis. 586; nor the omission of a stamp from his certificate: *Middleton* v. *Chambers*, 1 M. & G. 97.

Proceedings against one not an attorney, if he held himself out to the plaintiff as such, will not be set aside: *Lloyd* v. *Fenton*, Hay & Jon. 35.

In a suit against an attorney, he cannot conduct his defence both in person and by attorney: *Robinson* v. *Palmer*, 2 Allen (N. B.) 223; *Moscati* v. *Lawson*, 1 M. & Rob. 454; *New Brunswick Railroad Co.* v. *Conybeare*, 9 H. of L. Cas. 711; but see *Bolan* v. *Egan*, 2 Brev. 426; *Johns* v. *Bolton*, 12 Penn. St. 339; *Branson* v. *Caruthers*, 49 Cal. 374; *Cobbett* v. *Hudson*, 1 El. & Bl. 11.

An executor, administrator, guardian or trustee, who is also an attorney, cannot recover for professional services rendered the estate: 3 Wms. on Ex'rs (6th Am. ed.) 1854, y, &c., 1861, m; *Willard* v. *Bassett*, 27 Ill. 37; *Key's Estate*, 5 La. Ann. 567; *Allen* v. *Jarvis*, Law Rep., 4 Ch. 616; *Spinks* v. *Davis*, 32 Miss. 152; *Christophers* v. *White*, 10 Beav. 523; *Moore* v. *Frowd*, 1 Jur. 643; *Ontario* v. *Winnaker*, 13 Grant's Ch. 443; *Meighen* v. *Bell*, 24 Id. 503; *Broughton* v. *Broughton*, 5 De G., M. & G. 160; *Morgan* v. *Hannas*, 49 N. Y. 667; but see *Stanes* v. *Parker*, 9 Beav. 388, and cases in note; *Harris* v. *Martin*, 9 Ala. 895; *Morgan* v. *Nelson*, 43 Id. 585; *Mumma's Account*, 5 Pa. L. J. Rep. 424; *Scott* v. *State*, 2 Md. 284; *Clack* v. *Carton*, 7 Jur. (N. S.) 441; *Hanson* v. *Baillie*, 2 Macq. 80; *Teague* v. *Corbitt*, 57 Ala. 529; *Welge's Case*, 1 Fed. Rep. 216.

The rule does not apply when such costs are not payable out of the trust funds: *Col. Co.* v. *Cameron*, 24 Grant's Ch. 548.

The mayor of a city has been held competent to act as its attorney: *Niles* v. *Muzzy*, 33 Mich. 61. See *Gibson* v. *Zanesville*, 31 Ohio St. 184; *Powers* v. *Decatur*, 54 Ala. 214; but in Vin. Abr., *Attorney*, k, it is said that in an action by the commonalty of a town, one of the commonalty cannot appear as attorney for the commonalty, for he is party to the action; a statute prohibiting a director of a bank to appear as its attorney was deemed constitutional: *West Feliciana Railroad Co.* v. *Johnson*, 5 How. (Miss.) 273; so brokers who were also attorneys were held not entitled to charge counsel fees, for services about the business of their employer in relation to lands in their hands, as such brokers: *Walker* v. *Am. Nat. Bank*, 49 N. Y. 659; *Dyer* v. *Sutherland*, 75 Ill. 583; nor can a receiver act as his own counsel, so as to charge the estate for his services: *Bank of Niagara Case*, 6 Paige 213; *McGourky* v. *Downs*, MS., N. J. Chan., May Term 1880 (see *Adams* v. *Woods*, 8 Cal. 321); nor can one member of a partnership who is an attorney charge the others for professional services about the firm's affairs, either before or after dissolution: *Milburn* v. *Codd*, 7 B. & C. 419; *Van Duzer* v. *McMillan*, 37 Ga. 299; *McCrary* v. *Ruddick*, 33 Iowa 521; nor

can an attorney who is a mortgagee recover his costs on his own foreclosure: *Sclater* v. *Cottam*, 3 Jur. (N. S.) 630; *Patterson* v. *Donner*, 48 Cal. 369; nor can a solicitor who has an interest in attending to a cause, charge for his services, without an express agreement; *Martin* v. *Campbell*, 11 Rich. Eq. 205 (see *Deere* v. *Robinson*, 7 Hare 283); but he would be liable for costs: *Voorhees* v. *McCartney*, 51 N. Y. 387; *Cone* v. *Donaldson*, 47 Penn. St. 363; a director of a corporation who brought suit as an attorney against such corporation, was held entitled to costs: *Christie* v. *Sawyer*, 44 N. H. 298; as to a stockholder sustaining such relation, see *Spence* v. *Whitaker*, 3 Port. 297.

An attorney can recover *ordinary* witness fees when he offers himself as a witness in his own case: *Leaver* v. *Whalley*, 2 Dowl. 80; *Taaks* v. *Schmidt*, 25 How. Pr. 340; or is called in another's case during his regular attendance at that term; *Parks* v. *Brewer*, 14 Pick. 192; *Marshall* v. *Parsons*, 4 Jur. 1017; *Abbott* v. *Johnson*, 47 Wis. 239; but fees when so in attendance were refused in *McWilliams* v. *Hopkins*, 1 Whart. 276; *Crummer* v. *Huff*, 1 Wend. 25; *Jones* v. *Botsford*, 1 Pug. & Bur. 581; see *Reynolds* v. *Walker*, 7 Hill. 144.

Where the cause was conducted by one member of a firm of attorneys, the fees of another member called as a witness were allowed; *Butler* v. *Hobson*, 5 Bing. N. C. 128, 1 Arn. 424.

*Quære*, whether an attorney who calls himself as a witness can recover his fees, when the law does not allow other parties calling themselves to do so; *Grinnell* v. *Dennison*, 12 Wis. 402; *Hale* v. *Merrill*, 27 Vt. 738; *Nichols* v. *Brunswick*, 3 Cliff. 88; *Parker* v. *Martin*, 3 Pitts. 166; *Grub* v. *Simpson*, 6 Heisk. 92; *Delcomyn* v. *Chamberlin*, 48 How. Pr. 409; *Stratton* v. *Upton*, 36 N. H. 581; see *Howes* v. *Barber*, 18 Q. B. 588.

It seems a co-defendant who attended solely as a witness may recover; *Barry* v. *McGrade*, 14 Minn. 286; so if the plaintiff call the defendant; *Harvey* v. *Tebbutt*, 1 J. & W. 197; *Goodwin* v. *Smith*, 68 Ind. 301; *Leeds* v. *Amherst*, 14 Sim. 357; *Young* v. *English*, 7 Beav. 10; see *Hutchins* v. *Hutchins*, Ir. Law Rep., 10 Eq. 453. If an attorney refuse obedience to a subpœna he can be punished for contempt as a witness only, and cannot be deprived of his office as attorney; *Com.* v. *Newman*, 2 Phila. 262.

If an attorney bears any other relation to the subject-matter of the suit, *e. g.* as an agent, auctioneer, &c., the court will not exercise summary jurisdiction over him: *Cocks* v. *Harman*, 6 East 404; *Grubb's Case*, 5 Taunt. 206; *Edwards* v. *Hodding*, Id. 815; *Toms & Moore's Case*, 3 Ch. Cham. 41; see *Dickson* v. *Wilkinson*, 4 De G. & J. 508; *Carroll's case*, 2 Ch. Cham. 323; *Allen* v. *Aldridge*, 5 Beav. 401; *Rawes* v. *Rawes*, 7 Sim. 624; Weeks on Attorneys, §§ 77, 94; *Smith* v. *McLendon*, 59 Ga. 523; *Pennock* v. *Fuller*, 41 Mich. 153; 17 Am. Law Reg. N. S. 759 and note.

An attorney who is a party to a suit is entitled to recover his costs; *Gugy* v. *Brown*, Law Rep., 1 P. C. 411, reversing s. c. 11 Low. Can. 409; *Jervis* v. *Dewes*, 4 Dowl. P. C. 764.

He can recover nothing for loss of time; *Pritchard* v. *Walker*, 3 C. & P. 212; *Collins* v. *Godefroy*, 1 B. & Ad. 959; see *Corley* v. *Moore*, Glassc. 336; *Severn* v. *Olive*, 3 Irish Law Rec. 193.

He is not obliged to pay for a plea where he himself is plaintiff; *Anon.*, Sayer 77.

The institution of county courts does not destroy an attorney's privilege as to suing and being sued in his own court, and subject him to costs for not recovering more than the amount recoverable in the inferior court; *Lewis* v. *Hance*, 5 D. & L. 641; 11 Q. B. 921; *Jeffreys* v *Beart*, Id. 646; *Jones* v. *Brown*, 2 Exch. 329; *Johnson* v. *Bray*, 2 B. & B.

698; *Borradaile* v. *Nelson*, 14 C. B. 655; but see *Bailey's Case*, 1 Johns. Cas. 32; *Varian* v. *Ogilvie*, 3 Johns. 450; *Boulton* v. *Hubbard*, 6 Id. 332; *Walsh* v. *Sackrider*, 7 Id. 537; *Foster* v. *Garnsey*, 13 Id. 465; *Wood* v. *Gibson*, 1 Cow. 597; *Draper* v. *Beasley*, 8 U. C. Q. B. 260.

JOHN H. STEWART.

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*Supreme Court of Errors of Connecticut.*

## FRANK F. COOK *v.* LUCIUS M. JOHNSON.

The plaintiff for a sufficient consideration bought of the defendant his business as a dentist, and the latter executed a contract not to practice dentistry "within a radius of ten miles of Litchfield." The town of Litchfield has an extensive territory and an irregular outline, and contains the village of Litchfield, in which the defendant dwelt and had his office at the time, and where the contract was drawn and executed. *Held*, that the above expression meant "within ten miles of the centre of the village of Litchfield."

And held, that the contract was not void in not fixing a period within which the defendant was not to practise dentistry within those limits.

It seems that where such a contract is reasonable when made, subsequent circumstances, such as the covenantee's ceasing to do business, do not affect its operation.

PETITION for an injunction against the practise of dentistry by the respondent. Decree for petitioner and motion for a new trial by the respondent.

*H. B. Graves*, in support of the motion.

*C. B. Andrews* and *E. B. Kellogg*, contra.

The opinion of the court was delivered by

LOOMIS, J.—The questions presented by the respondent's motion for a new trial depend on the validity and construction of the following contract:

"Litchfield, Connecticut, April 2d 1874.

I this day sell and convey, to Frank F. Cook, all the furniture and fixtures in the rooms over Dr. Beckwith's drug store; also my good-will; and do agree and bind myself not to practise dentistry within a radius of ten miles of said Litchfield. And for the consideration above named have this day received one hundred dollars from Frank F. Cook's hand.

L. M. JOHNSON."

As this belongs to the class of contracts in restraint of trade, three requisites are essential to its validity. 1st. It must be

partial, or restricted in its operation in respect either to time or place. 2d. It must be on some good consideration. 3d. It must be reasonable, that is, it should afford only a fair protection to the interests of the party in whose favor it is made, and must not be so large in its operation as to interfere with the interests of the public.

The motion does not disclose that it was claimed in the court below that the contract was lacking in any of these elements, but only that it was too indefinite and uncertain in its language to be enforced. The respondent admits the making of the contract, and full performance on the part of the petitioner, but concedes that he has paid no attention to it whatever, except to keep the money paid under it. This is not very creditable, to say the least, and the excuse given does not at all relieve him in a moral point of view. He says, in effect, that inasmuch as he did not understand, by the language which he used in the contract, where the circle with its ten-mile radius would be drawn, he will locate within the town of Litchfield, where he can do the other party the most injury, and appropriate to himself the good-will of the business he had sold, knowing absolutely such conduct to be contrary even to his own understanding of the contract. Such a position might well excuse a court of equity from giving any construction to the contract merely for his future guidance.

But he says that he stands simply on his legal rights, and he insists that the contract by the rules of law is too uncertain and indefinite, both as to territory and time, to be binding. This question is involved in the motion for a new trial, and calls for a decision; and with a view to prevent future litigation between the parties, we will discuss it briefly.

The counsel for the respondent ask in their brief, "How can the court determine, under this contract, the territory from which the respondent is excluded from practising dentistry by the provision '*within a radius of ten miles from Litchfield?*' At what point is the radius to be taken? From the centre of the town of Litchfield? Or is it to be taken from the extreme boundaries of the town?" The construction suggested by the last interrogatory is manifestly unnatural and unreasonable. The large extent and irregularity of the boundary lines of the town, would extend the prohibited territory much further from the respondent's former place of business at certain points than at others, without any

reason for it founded on the extent of the good-will of the business in reference to which it is to be presumed the limits were prescribed. And besides, the term "radius," which means "a right line drawn or extending from the centre of a circle to its periphery" is wholly inapplicable to such a construction.

But in making such a contract the parties would naturally take their stand at the place where the business to be sold had been carried on, and would fix the utmost limits of the territory at equal distance from that point in every direction, and as far at least as they supposed the good-will might attract customers. Now the contract is dated at "Litchfield," where the post-office of that name was located, and the ten miles are to be computed from "*said* Litchfield," referring to the place where it was dated. It is also to be remarked that the precise point in the village of Litchfield, where the business referred to had been carried on by the respondent, is mentioned, namely, "in the rooms over Dr. Beckwith's drug store."

Now if we put ourselves in the position of the parties it would seem that the language which they used is capable of very easy and definite application, and thus construed the contract means ten miles in every direction from the centre of the village of Litchfield.

The only remaining inquiry is, whether any more definite limitation, as to time, is required.

The contract is silent in respect to the time of its duration. But there is a well-settled distinction between a general restriction as to *place* and a general restriction as to *time*. The mere fact that the duration of the restriction as to time is indefinite or perpetual, will not of itself avoid the contract if it is limited as to place, and is reasonable and proper in all other respects: *Hitchcock* v. *Coker*, 6 Ad. & E. 447; *Bun* v. *Guy*, 4 East 190; *Chesman* v. *Nainby*, 2 Strange 739; s. c. 2 Ld. Raym. 1456; *Wilkins* v. *Evans*, 3 You. & Jer. 318; *Mallen* v. *May*, 11 Mees. & Wels. 652; *Hastings* v. *Whitley*, 2 Exch. 611; Story on Sales, 1st ed., sect 493; *Pierce* v. *Woodward*, 6 Pick. 206; *Bowser* v. *Bliss*, 7 Blackf. 344.

It is said that the petitioner may cease to practise dentistry, and that in such case the respondent ought not to remain under a perpetual injunction. The court, in its discretion, might in the decree have anticipated such a contingency and provided for it, but the decree is not invalid on account of such omission, any more than the contract is

The rule as to the contract is, that if it is reasonable when made, subsequent circumstances, such as the fact of the covenantee ceasing business, so as no longer to need the protection, do not affect its operation: *Elves* v. *Crofts*, 10 C. B. 241.

A new trial is not advised.

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*Court of Appeals of Kentucky.*

## ORMSBY v. THE CITY OF LOUISVILLE.

Sunday not being a judicial day the publication of a city ordinance upon that day is not a valid compliance with the law requiring publication.

But where a publication is required by law for a certain period, as *e. g.* thirty days, the intervening Sundays will be counted in the enumeration, although no publication be made on them.

Where the charter of a city requires that "all ordinances shall be published" in a specified manner "before they are enforced," such publication is a condition precedent to the legal enforcement of an ordinance.

In pleading at common law the facts must be given showing compliance with a condition precedent, or excusing its performance; a general averment of compliance, is only an averment of a legal conclusion and therefore insufficient.

Interest is not allowable upon taxes by way of damages, and if any penalty or percentage is allowed by law, the party claiming it should show affirmatively a compliance with all the requirements of the law.

A description of property upon a tax-list need not be as full or precise as in a deed; it is sufficient if a person of ordinary capacity may understand what is meant by it.

APPEAL from the Louisville Chancery Court. Bill by the city of Louisville, under Act of March 3d 1876, to assert and enforce a lien for municipal taxes.

The opinion of the court was delivered by

HARGIS, J.—The charter and its amendments of the city of Louisville provide that all ordinances "*shall be published*" once in at least two papers of the largest circulation, "*before they are enforced.*" The annual levy ordinances for taxation are required to be adopted by the city council before taxes can be legally collected: *Boone* v. *Gleason*, decided in this court in 1878, not yet reported. And we think the charter and amendments above referred to, make the publication of such ordinances a necessary pre-requisite to their enforcement.

We have carefully investigated the authorities cited on all the questions presented for our consideration, and without referring to

all of them specifically, we will give the conclusions at which we have arrived, citing only such as we deem necessary to a correct understanding of this opinion.

The appellants demurred to the petition generally, their demurrer was overruled and they excepted.

The petition makes no reference to the publication of the annual ordinances, but after the demurrer to it was overruled the appellee filed a reply, in which it is alleged that "the plaintiff says that each one of the seven ordinances (*i. e.* levy ordinances) set up in the petition, each entitled an ordinance concerning taxes, were in all respects published as required by law."

This mode of pleading a condition precedent in a contract was authorized by sect. 149 of the Civil Code of 1851, but that section was omitted from the Civil Code of 1877, and thereby the rules of pleading as they existed before the Civil Code of 1851 in such cases were revived and the common-law rule restored.

A statement of the facts showing how and when a condition precedent was performed, or giving an excuse for its non-performance, was ordinarily required at common law. *Averbeck* v. *Hall*, 14 Bush 508, and authorities cited; Newman's Practice, p. 333.

The averment in the reply did not help the petition, because to allege that the ordinances were in all respects published as required by law is a legal conclusion.

The facts in regard to the publication should have been alleged, showing when and how the publication was made, and in what character of newspapers.

The court erred in overruling the demurrer to the petition.

As the plaintiff should be allowed to amend on the return of the cause, it becomes necessary to decide several other questions raised upon the record, which we proceed to do.

1. A publication of the levy ordinances on Sunday, and on no other day, before seeking to enforce them, is not such a publication as the charter requires or the law of this state approves.

It is not a judicial day, nor is it a day upon which any work, labor or calling can be legally pursued unless of necessity or charity. Legal process cannot ordinarily be legally served upon Sunday, and there is no reason shown why the publication of an ordinance of the city of Louisville on Sunday should be held as a compliance with its charter requiring publication of such ordinances. The publication is a violation of law, and no citizen is

bound, by any law known to us, to read secular newspapers on Sunday to entitle himself to the benefits which may flow from publications contained in them. If he chooses, he may refuse to read them on Sunday altogether, and none of his legal rights will be thereby forfeited.

Before the contents of the newspapers, the *Courier-Journal* and *Anzeiger*, could be lawfully proven, their absence should have been accounted for, either by proving their loss or the inability of the plaintiff, after a *bona fide* legal effort, to obtain possession or access to them. This is not a question of the existence of those papers, but as to their contents, and the best evidence of that fact, of which it is susceptible, should be adduced, and that evidence is furnished by the papers themselves.

The levy ordinance for the year 1873, approved May 28th, gave the assessor until June 10th to furnish to the city receiver the tax bills, and the ordinance for the year 1874 gave him until July 1st to perform that duty. By ordinance No. 482, all tax bills shall be due and payable on the first day of June of each year, and shall be listed in proper time with the receiver for collection. Ordinance No. 488 provided that notice should be published, in at least three newspapers, of the time at which taxes are due, and the place where the same will be received. And unless the notices by publication, required by sections one and two of ordinance No. 488, are made at the time and in the manner therein directed, no percentage shall be charged: Lucas's Digest 264, 265. There is no allegation in the petition or pleadings showing that such publication was made, and as the percentage is a penalty, it cannot be recovered in this action. And it ought never to be allowed unless the law has been completely complied with by the city. Interest is not allowable upon taxes by way of damages.

Section two of an Act approved February 17th 1866, requires that the board of commissioners of taxes and assessments shall cause public notice to be given in two or more daily newspapers in said city, for a space of not less than thirty days, that the assessment rolls of all persons assessed for taxation in said city are then open for examination and correction.

The fact that such notice was published, in the manner required by said section, should have been alleged and proved. But in counting the thirty days Sundays will not be thrown out. The

statute does not mean thirty secular days. It is like the service of a summons which is required to be served ten or twenty days before the beginning of the term; such service will be in time, although some of the days should be Sunday, provided the service shall not be made on Sunday. This is very different from publishing the notice on Sunday. If the notice be published thirty days, provided the first publication is not on Sunday, which is requisite to make the thirty days, it is sufficient, although the publication is not made upon the intervening Sundays, which ought not to be done.

As to the description of the lots sought to be taxed, it is not as full as it might have been, but from the nature of his duties the assessor could not, without great delay and embarrassment, give such a description of the property as is required in a deed or judgment. It would be unreasonable to require him to do so, and it tends greatly to prevent the collection of taxes. A simple tax roll, laid off into proper columns for the names of the owners, a brief description of the property, the valuation, with appropriate headings, so that a person of ordinary understanding may understand what is meant, and the property found on which the assessment is made, is all that is required by any state in the Union.

The number of feet front and the depth of the lots, with the name of the street and the side of the street on which they are located, also the names of the streets between which they are situated, are given, and we think the description sufficient.

The valuation is set down on the roll in perpendicular columns, headed "value per foot," "value of ground," "value of improvements" and "total value." The value at which the lots in question was assessed is placed under those heads on parallel lines running from left to right of the roll, opposite the names of the appellants and the description of the property, in Arabic numerals. There is no mark or sign accompanying the figures, indicating that they stand for dollars, other than the writing at the head of the perpendicular columns, as stated above. We think those headings show that the figures stand for value of the property opposite which they are placed.

There is no decimal mark or sign separating the figures in any of the columns except the one headed "total value." And in that a line separates two figures from the left, leaving three on the right, showing that cents were not meant by those three figures, as